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POST CHARGE TITLE VII CLAIMS: A PROPOSAL ALLOWING COURTS TO TAKE 'CHARGE' WHEN EVALUATING WHETHER TO PROCEED OR TO REQUIRE A SECOND FILING

Kelly Koenig Levi*

INTRODUCTION

In 2000, employees filed nearly 20,000 charges with the Equal Employment Opportunity Commission (EEOC) alleging they were subjected to employment discrimination in violation of Title VII of the Civil Rights Act of 1964.¹ This number, up from 1999,² demonstrates that despite employers' efforts to prevent discrimination in the workplace, employees continue to perceive discrimination based on sex, race, religion, and national origin, all which are protected classifications under Title VII.³ Indeed, employees have not been significantly discouraged from engaging in the initial administrative procedure required to bring an employment discrimination suit in federal court—filing a charge with their nearest EEOC office.⁴

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1. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGE STATISTICS FY 1992 THROUGH FY 2000, at <http://www.eeoc.gov/stats/charges.html> (last modified Jan. 18, 2001) [hereinafter CHARGE STATISTICS]. The EEOC is the federal administrative agency that interprets and enforces Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e (1994). Title VII of the Civil Rights Act of 1964 provides, in part, that it is unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1) (1994).

2. See CHARGE STATISTICS, *supra* note 1 (citing number of charges filed in 1999 as almost 18,000).

3. See 42 U.S.C. § 2000e-2(a)(1) (1994).

4. See Melli, Walker, Pease & Ruhly, *Employees Continue To File Thousands of EEOC Charges*, 8 No. 5 WIS. EMP. L. LETTER 3 (May 1999). A charging party must file an EEOC charge within either

After receiving a Title VII discrimination charge, the EEOC must serve the charged party with notice of the date, place, and circumstances of the allegedly unlawful employment practice.⁵ This requirement allows the employer to defend against the charges and commences the EEOC's investigation, which may be followed by conciliation and settlement attempts.⁶ Regardless of the EEOC's findings, the complainant cannot proceed with court action before receiving a right to sue letter from the EEOC.⁷ Thereafter, the charging party has approximately three months to file a complaint with the district court.⁸

The complaint should, of course, include the allegations described in the charge filed with the EEOC. After all, the EEOC issued a right to sue letter to the complainant authorizing a suit based on those allegations. What should occur, however, when the complaint includes claims of discrimination that the complainant did not raise in the EEOC charge? Because the district court only has subject matter jurisdiction when the complainant has filed an EEOC charge,⁹ should the court proceed with the claims or should the court require the plaintiff to file a new EEOC charge to ensure that the court has subject matter jurisdiction over the claim? What if the complaint includes claims of discrimination that occurred before those alleged in the EEOC charge? Should the same rule apply to claims of

180 or 300 days of the alleged discrimination. 42 U.S.C. § 2000e-5(e). If the alleged discrimination took place in a deferral state, a state that has its own state or local agency with authority to contest the alleged discrimination, the party has 300 days to file the charge with the EEOC. *Id.* The party must, however, first file with the state or local agency and then must wait sixty days, or until termination of the state proceedings, before filing with the EEOC. *Id.* § 2000e-5(c). In states without deferral agencies, the charging party must file with the EEOC within 180 days of the alleged discriminatory occurrence. *Id.* § 2000e-5(e).

5. 42 U.S.C. § 2000e-5(b); *see infra* Part I.

6. *See supra* note 5.

7. 42 U.S.C. § 2000e-5(f)(1); *see infra* Part I.

8. *See supra* note 7.

9. When a plaintiff fails to raise a Title VII claim before the EEOC, the district court lacks subject matter jurisdiction to entertain it. *See Love v. Pullman Co.*, 404 U.S. 522, 523 (1972); *Lowe v. City of Monrovia*, 775 F.2d 998, 1003 (9th Cir. 1986); *Shah v. Mt. Zion Hosp. & Med. Ctr.*, 642 F.2d 268, 271 (9th Cir. 1981).

discrimination that occurred after those alleged in the EEOC charge? Assume, for example, that the new charge of discrimination is one of retaliation for the employee's act of filing the EEOC charge. Should the same rule apply to a new charge based on the theory of sex discrimination, which occurred months after an initial claim of race discrimination? Should the same rule apply to a post charge allegation that includes a broad-based attack on different employment policies or practices?

Some courts answer yes to some or each of these questions, while other courts answer no to some or each of these questions.¹⁰ This Article seeks to answer the questions above by providing a way for the courts to take *charge* when addressing these questions. In doing so, this Article offers one rule that applies to all types of Title VII claims included in the court complaint, but not in the original or amended EEOC charge. Part I discusses the intricacies of the EEOC administrative filing procedures and the reasons for such procedures. Part II discusses how federal courts have dealt with Title VII claims alleged in the complaint, but not in the EEOC charge. More specifically, this section first addresses the two general legal rules that federal courts follow when dealing with these claims. Thereafter, it evaluates how courts have applied these rules to various types of post charge claims and the resulting problems.

Part III proposes a single standard for courts to apply to all post charge Title VII discrimination claims to determine whether the claims should proceed or whether the plaintiff should be required to file a second charge with the agency. In doing so, this section discusses the application of the proposed framework to various post charge Title VII claims. Finally, Part IV offers ways in which the proposed rule ensures that the policies behind the EEOC filing process are satisfied. Further, it suggests additional steps for courts to consider when determining whether to entertain the post charge claim

10 . *See infra* Part II.

or to require the complainant to become reacquainted with the filing procedures.

I. ADMINISTRATIVE FILING PROCEDURES AND PURPOSES

The administrative procedure for filing a discrimination charge with the EEOC is rather simple. An employee may file a charge in person, by mail or even by telephone.¹¹ The charge form, which is designed to be completed without counsel's assistance,¹² specifies the information required and even allows the complainant to mark boxes that are relevant to his or her allegations.¹³ The law requires that the charge contain specific information including, but not limited to: (1) the full name, address and telephone number of the charging person; (2) the full name and address of the person against whom the charge is made, if known; and (3) a clear and concise statement of the facts, including pertinent dates that constitute the alleged unlawful employment practices.¹⁴ Despite such requirements, the law also concludes that a charge is sufficient when the EEOC "receives . . . a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of."¹⁵

11. 29 C.F.R. § 1601.8 (2000); 12 No. 4 FLA. EMP. L. LETTER 5 (June 2000) (noting that employees can also stop in the local EEOC office and talk with an "intake officer"—an agency employee who will interview the employee about why they perceive they were discriminated against); *see also* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FILING A CHARGE, at <http://www.eeoc.gov/facts/howtofil.html> (last modified June 10, 1997).

12. *See infra* note 20 and accompanying text.

13. The form submitted to the EEOC allows the charging party to print an 'x' next to the relevant classifications of discrimination, including "Race," "Color," "Sex," "Religion," "Retaliation," "National Origin," "Disability," and "Other (*specify*)."
See, e.g., EEOC Blank Sample Form, at <http://www.cashpensions.com/CP3.html> (visited Dec. 20, 2001). Forms submitted to state or local agencies are similar. For example, the form submitted to the New York State Division of Human Rights allows the charging party to circle one or more of the following classifications or basis of discrimination: "Age, Race, Color, Creed (Religion), Sex, National Origin, Marital Status, Disability, Prior Arrest Record And/Or Conviction, Retaliation For Opposition An Unlawful Discriminatory Act."

14. 29 C.F.R. § 1601.12(a).

15. *Id.* § 1601.12(a), (b). Courts have concluded that a charge is sufficient if it "informed the EEOC of the identity of the parties and described the alleged discriminatory conduct in enough detail to enable it to issue an official notice . . . , thus setting the administrative machinery in motion." *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74, 78 (5th Cir. 1982); *see also* *Dupree v. Hous. Auth.*, 55 Fair

Thereafter, a charging party may amend the charge to cure technical defects and omissions and to clarify or amplify allegations made within the initial charge.¹⁶

Because Title VII is a remedial statute, the administrative filing process is quite liberal.¹⁷ An employee is not required to set forth with "literary exactitude" all of the facts and theories upon which the claim is based,¹⁸ nor is it a blueprint for the litigation that follows.¹⁹ To require heightened or exact pleading requirements would contradict Title VII because it may cause the very persons Title VII intended to protect to lose that protection. More specifically, employees, who may act without the assistance of counsel, are often ignorant of, or unable to thoroughly articulate, the discriminatory practices they experienced.²⁰

Empl. Prac. Cas. (BNA) 163, 167 (D. Kan. Jan. 11, 1991) (holding that letters complaining of sex discrimination constituted valid charges, even though the EEOC ignored them and issued a right to sue letter for the plaintiff's race charge only); *Montgomery v. Atlanta Family Rests., Inc.*, 752 F. Supp. 1575, 1576-77 (N.D. Ga. 1990) (holding letter from plaintiff's counsel qualified as a charge).

16. 29 C.F.R. § 1601.12(a), (b). An amended charge to cure technical defects or omissions or to clarify and amplify allegations made therein relate back to the original filing date. *Id.* §1601.12(b); see also *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 461-62 (5th Cir. 1970). Despite the suggestion that the filing process is simple, the time frame for filing a charge with the EEOC is more rigid. See *supra* note 4. The time periods are similar to a statute of limitations and are only extended based on concepts of waiver, estoppel, and equitable tolling. See *Zipes v. Trans World Airlines*, 455 U.S. 385, 386 (1982).

17. See *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 546 (6th Cir. 1991); see also *Lazic v. Univ. of Pa.*, 513 F. Supp. 761, 767-68 (E.D. Pa. 1981) ("[B]road remedial legislation such as Title VII is entitled to the benefit of liberal construction.") (quoting *Cohen v. Cmty. Coll. of Phila.*, 484 F. Supp. 411, 429 (E.D. Pa. 1980)).

18. *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 464 (1st Cir. 1996) (citing *Powers v. Grinnell Corp.*, 915 F.2d 34, 38 (1st Cir. 1990)).

19. See *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364 (4th Cir. 1976).

20. See *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971) (citing *King v. Ga. Power Co.*, 295 F. Supp. 943, 947 (N.D. Ga. 1968)); see also *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972) (noting that requiring additional filing requirements for Title VII would only add more procedural technicalities, which would be inappropriate for unrepresented complainants); *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977) ("[C]harges of discrimination filed before the EEOC will generally be filed by lay complainants who are unfamiliar with the niceties of pleading and are acting without the assistance of counsel.") (quoting *Tipler v. E.I. DuPont de Nemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971)); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970) (noting that pleading rules should be relaxed for Title VII due to its "decidedly informal atmosphere"); *Vayanich v. Republic Nat'l Bank of Dallas*, 409 F. Supp. 1083, 1087 (N.D. Tex. 1976) (emphasizing that the

The immediate purpose of the filing requirement is, however, clear and important. The filing requirement “initiate[s] the statutory scheme for remedying discrimination.”²¹ Once the EEOC receives a charge, it has ten days to serve the responding party with a copy, or at least notice, of the charge and will request that the respondent submit an answer in defense.²² After receiving and reviewing the answer, “the EEOC will determine whether it wishes to investigate further.”²³ If the EEOC proceeds further, it will investigate whether there is reasonable cause to conclude that the unlawful practices expressed in the charge are true.²⁴ The investigation—the focus of the EEOC’s procedures—may continue for no longer than 120 days after the filing of the charge.²⁵

If, through its investigation, the EEOC finds “reasonable cause” to believe that the charge is true, the case proceeds to the next phase of

charging party may be ignorant of or unable to completely describe the discriminatory practices to which they were subjected).

21. *Hicks v. ABT Assocs., Inc.*, 572 F.2d 960, 963 (3d Cir. 1978).

22. 42 U.S.C. § 2000e-5(b) (1994); 29 C.F.R. § 1601.14(a) (2000) (“Where a copy of the charge is not provided, the respondent will be served with a notice of the charge within ten days after the filing of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice.”).

23. See Susan Ritz, *Filing Discrimination Charges with the Equal Employment Opportunity Commission, the New York State Division of Human Rights and the New York City Commission on Human Rights*, 621 PLI/LIT 87, 91 (1999). If the EEOC does not choose to continue its investigation after receiving the defendant’s answer, it may issue a right to sue letter to the charging party. See *infra* note 31 and accompanying text.

24. 42 U.S.C. § 2000e-5(b). Title VII requires the EEOC to investigate unlawful employment practice charges filed with the EEOC. *Id.* “As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, or the respondent wishes to submit.” 29 C.F.R. § 1601.15(a). Additionally, the Commission may require the complainant to provide additional information and may also require a fact-finding conference with the parties. *Id.* § 1601.15(b); see also 1 EEOC COMPLIANCE MANUAL §§ 14.9, 25.1(a)(5) (2001). Title VII does not define “reasonable cause,” thereby making it difficult to state with exactitude what level of evidence is required for that standard. LEX K. LARSON, 4 EMPLOYMENT DISCRIMINATION § 73.05[1], (2d ed. 2001). Nonetheless, the EEOC has provided guidance by stating that a reasonable cause determination is “a determination that it is more likely than not that the charging party and/or members of a class were discriminated against because of a basis prohibited by the statutes enforced by EEOC.” *Id.* § 73.05[1] (quoting EEOC COMPLIANCE MANUAL § 40.2).

25. 42 U.S.C. § 2000e-5(b). During the investigation, the EEOC may issue subpoenas, require the respondent to supply evidence, conduct interviews, examine witnesses, and perform site inspections. 29 C.F.R. § 1601.16(a).

the administrative procedure—conciliation.²⁶ In light of Title VII's goal, which is to eliminate unlawful employment practices through conference, conciliation, and persuasion, the EEOC attempts to resolve all violations by "obtain[ing] [an] agreement that the respondent will eliminate the unlawful practices and will provide appropriate affirmative relief."²⁷ This agreement, which is meant to resolve disputes before the filing of a lawsuit, is binding and enforceable by the parties.²⁸ In theory, conciliation efforts are best achieved when a signed agreement prevents suit in district court. In reality, however, conciliation is the basis of the administrative procedures.²⁹ Conciliation often begins after a preliminary investigation, can proceed through a reasonable cause determination, and may continue even after the lawsuit commences.³⁰

If informal methods of conference, conciliation, and persuasion efforts fail, or even if the EEOC finds no reasonable cause,³¹ a charging party may request that the EEOC provide a right to sue letter.³² Once the charging party receives notice from the EEOC of

26. See 42 U.S.C. § 2000e-5(b).

27. 29 C.F.R. § 1601.24(a). An EEOC investigator may initiate the conciliation process by sending a proposed conciliation agreement to the defendant. 1 EEOC COMPLIANCE MANUAL § 64 (2001).

28. See LARSON, *supra* note 24, § 73.06[2].

29. See *id.* The EEOC must only make a good faith effort to conciliate. See *id.* If, however, the employer rejects the good faith efforts, the EEOC may end its efforts. See *id.* If, on the other hand, an agreement is reached through the conciliation procedure, an EEOC representative and the parties involved must sign the agreement. *Id.*; see, e.g., *Austin v. Reynolds Metals Co.*, 327 F. Supp. 1145, 1151-53 (E.D. Va. 1970); *Cox v. United States Gypsum Co.*, 284 F. Supp. 74, 84 (N.D. Ind. 1968).

30. See LARSON, *supra* note 24, § 73.06[2].

31. Where no cause is found, the charge should be dismissed without "particularized findings." Nancy Montwieler, *EEOC Adopts Charge-Priority System; Gives General Counsel More Authority*, DAILY LAB. REP., Apr. 20, 1995, at D3. See BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1234, n.181 (3d ed. 1996).

32. A determination of no reasonable cause does not prevent a claimant from filing a complaint in district court based on the claims within the charge. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973). However, a complainant must allow 180 days to pass from the time of the filing before he or she can request the letter unless the EEOC finds no reasonable cause before the 180 day deadline. SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 12:02 (1998); see also *Rodriguez v. Connection Tech., Inc.*, 65 F. Supp. 2d 107, 111 (E.D.N.Y. 1999).

Congress envisioned the EEOC's investigation and conciliation process would take 180 days or less to complete. LARSON, *supra* note 24, § 73.02[4]. However, this has not typically occurred and with frequent delays, the process may take several years. *Id.* A charging party who waits for the EEOC to

the right to sue, which is a prerequisite to court action, he or she has ninety days to file a complaint in court.³³ Despite Congress' attempt to resolve violations through conciliation and voluntary compliance, most discrimination allegations proceed to federal court. Here too, the process begins with a filing procedure—the filing of a complaint.

Like all other complaints filed in federal court, complaints alleging Title VII violations must set forth a “short and plain statement of the claim showing that the pleader is entitled to relief.”³⁴ Likewise, the complaint must plead that administrative procedures have been met.³⁵ This leads to the question of whether a plaintiff has satisfied the administrative filing procedure when the court complaint contains allegations of discrimination that were not included in the EEOC charge. Should the plaintiff be required to file a new charge and wait for the EEOC to conduct an investigation and proceed with informal methods of reconciliation once again? Or should the court assert jurisdiction over the new claim or claims and entertain both old and new claims together?

II. THE SCOPE OF THE FEDERAL COURT COMPLAINT

A. Current Framework Governing Post Charge Title VII Claims

It is not surprising that much litigation has ensued regarding the scope of the Title VII complaint. When the complaint is broader than the EEOC charge, courts have developed two rules to determine whether to allow the complaint to proceed. More than thirty years ago, in *Sanchez v. Standard Brands, Inc.*,³⁶ the Fifth Circuit Court of Appeals concluded that the scope of the complaint is not limited by

complete its process, including the right to sue letter, may wait up to five years or more to bring the action in court. *Id.*

33. 42 U.S.C. § 2000e-5(f) (1994); see, e.g., *Streeter v. Joint Indus. Bd. of Elec. Indus.*, 767 F. Supp. 520, 527 (S.D.N.Y. 1991); *Motley v. Bell Tel. Co.*, 562 F. Supp. 497, 498 (E.D. Pa. 1983); *Chastain v. W. Elec. Co.*, 27 Fair Empl. Prac. Cas. (BNA) 77, 80 (N.D. Cal. Sept. 29, 1981).

34. FED. R. CIV. P. 8(a)(2).

35. FED. R. CIV. P. 9(c).

36. 431 F.2d 455 (5th Cir. 1970).

the charge, but by “the ‘scope’ of the EEOC investigation which can reasonably be expected to grow out of the charge.”³⁷ Soon after, in *Oubichon v. North America Rockwell Corp.*,³⁸ the Ninth Circuit Court of Appeals offered a slightly different rule, specifying that the complaint may encompass “any discrimination like or reasonably related to the allegations of the EEOC charge.”³⁹ Over time, however, some courts have linked the rules together by first noting that a court may “consider claims of discrimination reasonably related to the allegations filed with the EEOC,” emphasizing that “[t]he test of reasonable relationship is whether the issues sought to be litigated in court could be expected to grow out of the administration charges.”⁴⁰ Other courts, which have concluded the tests yield different results, have used both rules to determine whether post charge allegations can proceed to litigation.⁴¹

There is little uniformity in the application of the *Sanchez* and *Oubichon* rules. When applying either rule, most courts conclude that a retaliation claim, which results from the act of filing the EEOC charge, may proceed.⁴² However, when the act of retaliation occurs prior to filing the charge, courts usually do not allow the new claim to

37. *Id.* at 466.

38. 482 F.2d 569 (9th Cir. 1973).

39. *Id.* at 571.

40. *EEOC v. Nat'l Broad. Co.*, No. 86 Civ. 1121, 1990 WL 52283, at *1 (S.D.N.Y. Apr. 17, 1990) (quoting *Kirkland v. Buffalo Bd. Of Educ.*, 622 F.2d 1066, 1068 (2d Cir. 1980)).

41. See *Butts v. City of New York Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993); *Walters v. President & Fellows of Harvard Coll.*, 616 F. Supp. 471, 475 (D. Mass. 1985). Courts have not, however, developed more specific or additional rules for the various post charge allegations that appear before them.

42. *Anderson v. Roen*, 190 F.3d 930, 938 (9th Cir. 1999); *Butts*, 990 F.2d at 1402; *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992); *Archuleta v. Colo. Dep't of Insts.*, 936 F.2d 483, 488 (10th Cir. 1991); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989); *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682 (10th Cir. 1988); *Baker v. Buckeye Cellulose Corp.* 856 F.2d 167, 168-69 (11th Cir. 1988); *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981); *Scott v. City of Overland Park*, 595 F. Supp. 520, 526 (D. Kan. 1984). In allowing retaliation claims to proceed, courts have concluded that, “[i]t is difficult to imagine a claim more related to a charge and growing out of it than a claim that one was fired for filing that charge.” *Portlock v. Painewebber, Inc.*, 46 Fair Empl. Prac. Cas. (BNA) 1181, 1182 (N.D. Ill. Feb. 4, 1987).

proceed.⁴³ Courts are less uniform in the application of the rules when addressing a new classification or type of discrimination.⁴⁴ Many courts have concluded a race discrimination charge can support an action for national origin discrimination and vice versa.⁴⁵ Most courts, however, do not expand quite this much and frequently conclude that neither rule allows a charge of sex discrimination to support a complaint of race discrimination or any other type of unrelated discrimination.⁴⁶ Nonetheless, some courts have allowed such claims to go forward.⁴⁷ Courts have also applied the rules when addressing the broadening of a charge and rarely allow a plaintiff to proceed with a broad-based attack on employment practices.⁴⁸ Few courts have concluded otherwise and have allowed a plaintiff to expand a discriminatory discharge claim to include discrimination in promotion.⁴⁹ Indeed, there is little uniformity in the outcomes of post charge Title VII claims.

43. See, e.g., *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 546 (6th Cir. 1991); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988); *Riley v. Technical & Mgmt. Servs. Corp.*, 872 F. Supp. 1454, 1460 (D. Md. 1995); *Whitehead v. AM Int'l, Inc.*, 860 F. Supp. 1280, 1288-89 (N.D. Ill. 1994); *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 274, 284 (D. Minn. Aug. 9, 1979), *aff'd in part and rev'd in part on other grounds*, 623 F.2d 1279 (8th Cir. 1980). But see *Butts*, 990 F.2d at 1402; *Keehn v. S. Fayette Township Sch. Dist.*, 67 L.R.R.M. (BNA) 710, 711-12 (W.D. Pa. Mar. 22, 1995); *Elbaz v. Congregation Beth Judea, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 654, 657 (N.D. Ill. July 6, 1992).

44. See generally *Tart v. Hill Behan Lumber Co.*, 31 F.3d 668 (8th Cir. 1994); *Rush v. McDonald's Corp.*, 966 F.2d 1104 (7th Cir. 1992).

45. See, e.g., *Alonzo v. Chase Manhattan Bank*, 25 F. Supp. 2d 455, 459 (S.D.N.Y. 1998); *Lazuran v. Kemp*, 142 F.R.D. 466, 469 (W.D. Wash. 1991).

46. For discussion of courts not allowing a different type of discrimination claim to proceed, see, e.g., *Antol v. Perry*, 82 F.3d 1291, 1295 (3d Cir. 1996); *Jones v. Runyon*, 91 F.3d 1398, 1401-02 (10th Cir. 1996); see also *Archuleta*, 936 F.2d at 488; *Clements v. St. Vincent's Hosp.*, 919 F. Supp. 161, 163 (S.D.N.Y. 1996); *Clemmer v. Enron Corp.*, 882 F. Supp. 606, 611 (S.D. Tex. 1995).

47. See *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 168 (7th Cir. 1976); *Alonzo v. Chase Manhattan Bank, N.A.*, 25 F. Supp. 2d 455, 459-60 (S.D.N.Y. 1998); *Vuyanich v. Republic Nat'l Bank*, 409 F. Supp. 1083, 1089 (N.D. Tex. 1976).

48. See LARSON, *supra* note 24, § 76.06[1][c]. But see *Yarber v. Indiana State Prison*, 713 F. Supp. 271, 275-76 (N.D. Ind. 1988) (applying "reasonably related" rule to allow additional racially discriminatory work environment and racially motivated harassment claims, but disallowing a denial of promotion claim).

49. LARSON, *supra* note 24, § 76.06[1][c]; see *Staples v. Avis Rent-A-Car Sys.*, 537 F. Supp. 1215, 1219 (W.D.N.Y. 1982). *Staples* allowed a failure to rehire claim to proceed from a discriminatory

B. Reasons for Volatility of Rulings Regarding Post Charge Allegations

1. Courts Focusing on Actual Investigation

The inconsistency of the courts' rulings does not result merely from the existence of the *Sanchez* and *Oubichon* rules. Rather, the problem centers around the application of the rules and specifically, the courts' focus on the EEOC investigation.⁵⁰ When considering the confines of the complaint, courts often conclude that it is limited to the EEOC's *actual* investigation.⁵¹ For example, in *Clark v. Kraft Foods, Inc.*,⁵² the plaintiff filed a charge with the EEOC alleging sexual harassment and retaliation.⁵³ However, in her complaint, she included a gender discrimination allegation.⁵⁴ When evaluating whether the gender discrimination claim could proceed, the court emphasized the EEOC investigated the gender claim and as a result, exhausted the administrative requirements.⁵⁵

Similarly, in *EEOC v. Tempel Steel Co.*,⁵⁶ the court emphasized that during an investigation, the EEOC is not obliged to cast a blind eye over facts that support a charge of another type of discrimination than that in the filed charge.⁵⁷ Because the EEOC uncovered evidence of discrimination in hiring and recruitment policies, the court allowed

discharge charge, concluding that under *Sanchez*, the EEOC would investigate rehiring issues when uncovering a discriminatory discharge. *Staples*, 537 F. Supp. at 1218-19.

50. See LARSON, *supra* note 24, § 76.06[1][e].

51. See, e.g., *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 464 (1st Cir. 1996); *Antol v. Perry*, 82 F.3d 1291 (3d Cir. 1996); *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 546 (6th Cir. 1991); *Walters v. Parsons*, 729 F.2d 233, 238 (3d Cir. 1984); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 491 (4th Cir. 1981); *Zalewski v. M.A.R.S. Enters. Ltd.*, 651 F. Supp. 601, 604-05 (D. Del. 1982); *Hubbard v. Rubbermaid, Inc.*, 436 F. Supp. 1184, 1190-91 (D. Md. 1977) ("In the absence of any indication of dereliction by the agency, . . . the scope of an EEOC investigation should [in most cases] be conclusive on the scope of a subsequent Title VII suit . . .").

52. 18 F.3d 1278 (5th Cir. 1994).

53. *Id.* at 1280.

54. *Id.* at 1279.

55. *Id.* at 1280.

56. 723 F. Supp. 1250 (N.D. Ill. 1989).

57. *Id.* at 1252 (quoting *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 365-66 (4th Cir. 1976)).

these allegations to continue despite the fact the charge included merely one allegation of discriminatory failure to rehire.⁵⁸

In *Shah v. Mt. Zion Hospital and Medical Center*,⁵⁹ the court emphasized the importance of the investigation when applying the *Oubichon* rule, even though the rule does not contain language referring to the scope of the "EEOC's investigation."⁶⁰ After noting the rule that a federal court has jurisdiction over claims "reasonably related to the allegations of the EEOC charge,"⁶¹ the Ninth Circuit Court of Appeals noted that the allegations raised in the complaint, but not in the charge, were not investigated by the EEOC and were, therefore, properly dismissed by the lower court.⁶²

In *EEOC v. General Electric Co.*,⁶³ the Fourth Circuit Court of Appeals went so far as to conclude that the original charge is sufficient to support any discrimination developed in the course of a reasonable investigation provided such discrimination was included in the EEOC's reasonable cause determination.⁶⁴ In fact, *Sanchez v. Standard Brands, Inc.*⁶⁵—the case that established the current framework—demonstrates the importance the court places on the EEOC's actual investigation.⁶⁶ The initial charge in *Sanchez* was one of sex discrimination.⁶⁷ However, the EEOC's investigation revealed

58. *Id.* at 1252-53. For examples of courts reviewing the actual investigation when evaluating post charge retaliation claims, see *Walters v. Parsons*, 729 F.2d 233, 238 (3d Cir. 1984); *EEOC v. Reichhold Chems., Inc.* 700 F. Supp. 524, 526-27 (N.D. Fl. 1988).

59. 642 F.2d 268 (9th Cir. 1981).

60. Compare *Shah v. Mt. Zion Hosp. & Med. Ctr.*, 642 F.2d 268, 272 (9th Cir. 1981), with *Oubichon v. N. Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973).

61. *Shah*, 642 F.2d at 271 (quoting *Oubichon*, 482 F.2d at 571).

62. *Id.* at 272; see also *Ferguson v. Mobil Oil Corp.*, 443 F. Supp. 1334, 1337 (S.D.N.Y. 1978) (dismissing a claim under Title VII, which was not in original EEOC charge, when the charge was not investigated by EEOC nor reasonably related to EEOC charge).

63. 532 F.2d 359 (4th Cir. 1976).

64. *Id.* at 366; see also *EEOC v. Bailey Co.*, 563 F.2d 439, 448 (6th Cir. 1977); *EEOC v. Westvaco Corp.*, 372 F. Supp. 985, 992 (D. Md. 1974); *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1336 (D. Del. 1974) ("Since the determination of reasonable cause defines the framework for conciliation, it follows that the issues to be litigated here must be those which can fairly be said to be encompassed within the determination resulting from the . . . charge.").

65. 431 F.2d 455 (5th Cir. 1970).

66. *Id.* at 466.

67. *Id.* at 458.

the employer discriminated against the complaining party because of her national origin, thereby allowing the subsequent allegation to proceed.⁶⁸ In sum, the courts' reasoning and application of the rule seems basic and clear when there is an EEOC investigation upon which it can focus. The task becomes more difficult and subjective, however, when no such investigation occurs.

2. Courts Focusing on a Potential or Hypothetical Investigation

The application of the scope of the investigation rule becomes further strained when the EEOC does not conduct an investigation.⁶⁹ While a review of the actual investigation meets the goals of conciliation and notice to the employer, reviewing the investigation is disconnected from these goals when no investigation occurs. As discussed in Part I, not every charge proceeds to conciliation and settlement.⁷⁰ Instead, soon after receiving the respondent's answer, the agency may issue a right to sue letter to the charging party without further investigation.⁷¹

In such situations, courts cannot evaluate the actual investigation, but instead, look to what *would* have been uncovered during a reasonable EEOC investigation of the plaintiff's charge.⁷² For

68. *Id.* at 459-66; *see also* Avagliano v. Sumitomo Shoji Am., Inc., 614 F. Supp. 1397, 1403 (S.D.N.Y. 1985) (treating a later discriminatory charge filed with the EEOC as part of the original charge when the EEOC in fact investigated both charges together).

69. *See, e.g.,* Powers v. Grinnell Corp., 915 F.2d 34, 39 (1st Cir. 1990) (noting the record below did not indicate whether the EEOC or state agency conducted an investigation and therefore defining the scope of the EEOC charge as what could reasonably be expected to have been investigated by EEOC).

The lack of an EEOC investigation does not preclude a civil suit. In fact, courts have concluded that the EEOC's failure to conciliate is neither a jurisdictional requirement nor is it a condition precedent to private actions under Title VII. *See* Sedlacek v. Hach, 752 F.2d 333, 335 (8th Cir. 1985).

70. *See supra* note 23 and accompanying text.

71. *See supra* notes 23-32 and accompanying text; Park v. Howard Univ., 71 F.3d 904, 907 n.1 (D.C. Cir. 1995).

72. *See, e.g.,* Powers, 915 F.2d at 39. For a discussion on the confusion within the case law, *see* Stehle v. Gen. Mills Rest., Inc., 875 F. Supp. 320, 322-23 (D.S.C. 1994). In *Int'l Bhd. of Elec. Workers, Local 1805 v. Westinghouse Elec. Corp.*, the plaintiff filed an EEOC charge alleging constructive discharge when she took maternity leave. 25 Fair Empl. Prac. Cas. (BNA) 1093, 1094 (D. Md. June 15, 1979). The court found the EEOC could reasonably have been expected to investigate limiting maternity leave to employees with nine months of employment. *Id.* at 1098; *see also* Duggins v. Steak 'N Shake, Inc., 195 F.3d 828, 832 (6th Cir. 1999) (allowing claim of retaliation to proceed when

example, in *Carmody v. Colorado Funeral Services*,⁷³ the plaintiff filed a charge alleging hostile work environment sexual harassment.⁷⁴ The complaint, however, also included an allegation of quid pro quo sexual harassment.⁷⁵ The court agreed the charge provided the EEOC and the employer with sufficient information for any reasonable investigation to include an inquiry about possible quid pro quo harassment.⁷⁶ In sum, the court concluded the charge provided the EEOC the *opportunity and invitation* to investigate quid pro quo harassment.⁷⁷ Indeed, the court did not consider, nor note, that the EEOC failed to pursue such opportunity because it did not investigate the initial charge.⁷⁸

When the EEOC does not investigate, courts introduce a high degree of subjectivity when analyzing whether an investigation *would have included* the post charge allegations.⁷⁹ In *Tart v. Hill Behan Lumber Co.*,⁸⁰ the plaintiff filed a charge alleging racial

complainant related facts in the original EEOC charge that would have prompted an EEOC investigation into the charge); *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167 (11th Cir. 1988) (holding the scope of the complaint is governed by what a reasonable EEOC investigation would have been); *Walters v. President & Fellows of Harvard Coll.*, 616 F. Supp. 471, 475 (D. Mass. 1985) (holding the action's scope is "co-extensive with 'the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination'") (quoting *Mamos v. Sch. Comm. of Town of Wakefield*, 553 F. Supp. 989, 992 (D. Mass. 1983)).

73. 76 F. Supp. 2d 1101 (D. Colo. 1999).

74. *Id.* at 1104.

75. *Id.*

76. *Id.*

77. *Id.*; see also *Oglesby v. Coca-Cola Bottling Co.*, 620 F. Supp. 1336, 1344 (N.D. Ill. 1985) ("What controls is not what the EEOC did but what it was given the opportunity to do.").

78. See generally *Carmody v. Colo. Funeral Servs.*, 76 F. Supp. 2d 1101 (D. Colo. 1999). In fact, in *Cardenas v. AT&T Corp.*, the court went one step further to conclude the actual investigation is irrelevant. No. 8:97CV344, 1998 WL 257209, at *3 (D. Neb. Jan. 26, 1998). The plaintiff filed a charge alleging race, color, and age discrimination, but the federal court complaint contained a disparate impact claim as well. *Id.* at *1-*2. When addressing whether the disparate impact claim was within the scope of the investigation, the court emphasized the exposure of the claim to the agency through written discussions with agency investigators assigned to investigate the plaintiff's claims. *Id.* at *3. As a result, it was inconsequential that the agency did not actually investigate the claim. *Id.* Rather, it was clearly within the reasonable scope of the investigation. *Id.*

79. See *Dixit v. City of New York Dep't of Gen. Servs.*, 972 F. Supp. 730, 734 (S.D.N.Y. 1997) (stating it is "necessary to predict whether the . . . EEOC complaint could reasonably have been expected to trigger an investigation of alleged discriminatory treatment").

80. 31 F.3d 668 (8th Cir. 1994).

discrimination in his discharge and received a right to sue letter on that charge.⁸¹ At trial, the plaintiff requested the court also instruct the jury on a claim of racial harassment.⁸² The district court refused the request, and the plaintiff appealed the decision alleging the racial harassment claim was within the scope of the suit.⁸³ In doing so, the plaintiff argued the racial harassment claim would have been within the scope of the administrative investigation.⁸⁴ Clearly noting that the EEOC did not conduct an investigation, the Eighth Circuit Court of Appeals emphasized that “[h]ad the agency investigated . . . the scope of the investigation would have been no broader than a search for evidence relating to the discharge itself and the motivations underlying the discharge.”⁸⁵ As a result, the court did not allow the racial harassment claim to proceed.⁸⁶

Not surprisingly, other courts have applied the scope of the investigation rule to a potential investigation and have concluded the new charge would have been within the scope of an EEOC investigation. For example, in *Miller v. Federal Express Corp.*,⁸⁷ the plaintiff filed a race discrimination charge with the EEOC alleging wrongful termination, but did not include incidents of race discrimination and retaliation that occurred after she was rehired and involved a suspension without pay.⁸⁸ In evaluating whether the uncharged allegations could proceed, the court reasoned the agency, in investigating, would “by necessity,” have had to investigate whether a five-day suspension without pay was appropriate.⁸⁹ The court suggested, despite the absence of an EEOC investigation, the plaintiff did not need to file a separate charge.⁹⁰

81. *Id.* at 670.

82. *Id.* at 671.

83. *Id.*

84. *Id.*

85. *Id.* at 673.

86. *See Tart v. Hill Behan Lumber Co.*, 31 F.3d 668, 674 (8th Cir. 1994).

87. 56 F. Supp. 2d 955 (W.D. Tenn. 1999).

88. *Id.* at 961.

89. *Id.*

90. *Id.*

The minimal reasoning and high subjectivity of the courts' analyses, which often considers a hypothetical investigation, confirms that the scope of the investigation rule causes inconsistencies and does not act as an appropriate rubric for analyzing post charge claims. In *Clockedile v. New Hampshire Department of Corrections*,⁹¹ the First Circuit Court of Appeals focused on the problem with applying the scope of the investigation rule when no investigation occurs.⁹² In *Clockedile*, the plaintiff filed a charge alleging sexual harassment.⁹³ The complaint, however, also included a charge of retaliation.⁹⁴ At trial, the jury awarded damages on the retaliation claim.⁹⁵ Thereafter, the trial court granted the defendant's post trial motion to set aside the award because the plaintiff failed to include the retaliation claim in the administrative charge.⁹⁶ On appeal, the First Circuit reiterated the current framework that limits a lawsuit to claims that "must reasonably be expected to . . . have been within the scope of the EEOC's investigation."⁹⁷ Thereafter, the court emphasized the scope of the investigation rule is less legitimate, and loses its rationale, when no investigation takes place.⁹⁸

It is far from surprising that such different approaches have yielded inconsistent results. While a review of the actual investigation seems like a fair and structured approach, such structure crumbles when the EEOC does not conduct an investigation. In such cases, courts attempt to determine what the EEOC would have done, or could have done, had it investigated and carried out Title VII's statutory goals. This subjectivity can punish a plaintiff whose claim was not investigated. Similarly, a rule that focuses only on the actual

91. 245 F.3d 1 (1st Cir. 2001).

92. *Id.* at 4-6.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Clockedile v. N.H. Dep't of Corr.*, 245 F.3d 1, 4 (1st Cir. 2001) (quoting *Johnson v. Gen. Elcc.*, 840 F.2d 132, 139 (1st Cir. 1988)) (alterations in original).

98. *Id.* at 5.

investigation may punish a plaintiff who was not fortunate enough to have a court evaluate what a hypothetical or potential EEOC could have included. Indeed, a new framework that can determine which post charge claims should proceed through litigation is necessary to address this problem.

III. PROPOSED FRAMEWORK FOR EVALUATING POST CHARGE TITLE VII CLAIMS

Most recently, in *Clockedile v. New Hampshire Department of Corrections*, the First Circuit Court of Appeals articulated a new rule to address post charge retaliation claims.⁹⁹ Rather than including language specifying or referring to the investigation, the court concluded these claims are “preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency.”¹⁰⁰ This Part demonstrates that courts can apply this rule, with some additional considerations, to all post charge discrimination claims.

The proposed rule is a two-part test. First, the post charge claim or claims must be reasonably related to the filed charge, that is, the post charge claims must develop from the same factual basis as any of the claims included within the charge.¹⁰¹ Additionally, under this first prong, courts should consider whether the same individuals at the same location, whose conduct created the claims within the charge, carried out the post charge discrimination.¹⁰² Second, the post charge

99. See generally *id.*

100. *Id.* at 6.

101. Some courts have suggested a factual relationship when reiterating the ‘reasonably related’ and ‘grow out’ language. See, e.g., *Davis v. Sodexho, Cumberland Coll. Cafeteria*, 157 F.3d 460, 463 (6th Cir. 1998) (“[W]here facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim.”). The test suggested in this Article clarifies the factual relationship required.

102. See *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 465 (1st Cir. 1996); *McKenzie v. Ill. Dep’t of Transp.*, 92 F.3d 473, 481 (7th Cir. 1996) (quoting *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994)); *Archuleta v. Colo. Dep’t of Insts.*, 936 F.2d 483, 488 (10th Cir. 1991); *Saldana v. City of Chicago*, 972 F. Supp. 453, 457-58 (N.D. Ill. 1997) (quoting *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994)); *Moore v. Allstate Ins. Co.*, 928 F. Supp. 744, 749 (N.D. Ill. 1996) (quoting

claim or claims must grow out of the charge made to the agency so that the post charge claims are continuations of discrimination that arise from the same factual basis¹⁰³ as any of the claims within the charge made to the agency.¹⁰⁴ The post charge claims do not, however, have to be the same type of discrimination as alleged to the agency.¹⁰⁵ Alternatively, the second element of the rule is met if the post charge claims allege behavior that occurred as a direct consequence of the plaintiff's act of filing a charge with the agency.¹⁰⁶

This rule does not contain unfamiliar language. Rather, it combines the language of both the *Sanchez* and *Oubichon* approaches while omitting any focus on the agency's investigation.

A. Retaliation Claims

Title VII protects employees from retaliation. Specifically, it makes it an unlawful employment practice for an employer to discriminate against one who opposes any practices forbidden or made unlawful under the statute or against one who filed a complaint, making a charge, testifying, assisting, or participating in any investigation,

Cheek v. W. & S. Life Ins. Co., 31 F.3d 497, 501 (7th Cir. 1994)); Walsh v. Nat'l Westminster Bancorp., Inc., 921 F. Supp. 168, 172 (S.D.N.Y. 1995).

103. 'Basis' refers to the factual nature of the claim.

104. See cases cited *supra* note 102.

105. 'Type' refers to the classification of Title VII discrimination, including sex, race, religion, national origin and retaliation. Sexual harassment, also protected under Title VII, is included within the "sex" classification. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986). Sexual harassment constitutes actionable sex discrimination under Title VII when the workplace is permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 65, 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (alterations in original).

106. See, e.g., *supra* note 41. The rule allows for the possibility that there may be one or more filed claims and one or more post filed claims. If there is one of each, the rule provides that those two claims will be evaluated alone. If there is more than one post charge claim, the court will evaluate whether *any* of the post charge claims develops from the same factual basis as *any* of the claims included within the charge. Likewise, the court will evaluate whether *any* of the post charge claims is a continuation of discrimination, which arises from the same factual basis as *any* of the claims included within the charge.

proceeding, hearing, or litigation under Title VII.¹⁰⁷ There are two types of post charge retaliation claims. The first type alleges retaliation for the plaintiff's act of filing the original charge.¹⁰⁸ The second type alleges the retaliatory act occurred before the plaintiff filed the EEOC charge.¹⁰⁹ The proposed rule is intended to address both types of post charge retaliation claims.¹¹⁰

1. Retaliation Resulting From Filing EEOC Charge

The retaliation provision within Title VII protects an employee who has "made a charge" with the EEOC or state agency.¹¹¹ Assume, for example, the situation in *Lazic v. University of Pennsylvania*,¹¹² where the plaintiff filed a complaint with the EEOC charging that her employer engaged in sex discrimination.¹¹³ More specifically, the plaintiff was an assistant professor of Slavic languages with a two-year appointment.¹¹⁴ Despite excellent reviews from her students, the head of the Slavic Language Department, who recommended to the dean the plaintiff be reappointed, also submitted two negative letters from a tenured department member who recommended that the plaintiff not be reappointed.¹¹⁵ The plaintiff protested to both the

107. 42 U.S.C. § 2000e-3(a) (1994). Generally, a plaintiff proves a prima facie case of retaliation if "1) he/she engaged in an activity protected by statute; 2) he/she suffered an adverse action; and 3) there is a causal connection between the protected activity and the adverse action." Penny Nathan Kahan & Lori L. Deem, *Sexual Harassment Update*, in 2 ALI-ABA COURSE OF STUDY: CURRENT DEVELOPMENTS IN EMPLOYMENT LAW pt. III.C (July 1999). "Retaliation charges filed with the EEOC increased more than seventy-two percent from 1992 to 1998, resulting in more than 19,000 such claims in fiscal year 1998." Elana Olson, Note, *Beyond the Scope of Employer Liability: Employer Failure to Address Retaliation by Co-Workers After Title VII Protected Activity*, 7 WM. & MARY J. WOMEN & L. 239, 243 (2000).

108. LARSON, *supra* note 24, § 76.06[1][d].

109. *Id.*

110. "[B]y protecting employees from potentially adverse consequences that may otherwise follow from reporting a violation of the statute," Congress intended the anti-retaliation provisions to enhance the effectiveness of Title VII. Olson, *supra* note 107, at 245-46.

111. See *supra* note 107 and accompanying text; see also Jennifer Smith, *Retaliation Claims: What You Don't Know Can Hurt You*, 14 NAT'L B. ASS'N MAG. 22, 22 (2000).

112. 513 F. Supp. 761 (E.D. Pa. 1981).

113. *Id.* at 765.

114. *Id.* at 764.

115. *Id.*

dean and to the American Association of University Professors and later appealed the University's decision to deny her reappointment.¹¹⁶ Following the trustees' and administration's final decision to deny her reappointment, the plaintiff filed a charge alleging females were treated differently than males within the department.¹¹⁷ The plaintiff did not, however, include any allegation of retaliation within the EEOC charge.¹¹⁸ Nonetheless, the plaintiff's amended complaint alleged the University retaliated against her for raising complaints about the defendant's discriminatory practices.¹¹⁹

The plaintiff alleged the retaliation, which occurred after the plaintiff filed the EEOC charge and before the University learned the EEOC had completed its investigation,¹²⁰ occurred when the head of the Slavic Languages Department wrote a letter to University's associate director of placement requesting the Placement Department delete the positive references he made on behalf of the plaintiff.¹²¹ The director deleted these recommendations, which were part of the plaintiff's professional file, and consequently, could not be forwarded to potential employers.¹²² Should the federal court entertain the retaliation claim in addition to the claim included within the charge, or should the court require the plaintiff to file a second charge with the EEOC?

Here, the plaintiff's claim demonstrates the first type of post charge retaliation claim, where the alleged retaliation results from the plaintiff's act of filing the original charge. Applying either *Sanchez* or *Oubichon*, or a combination of both, most courts have allowed such a claim to proceed despite the plaintiff's failure to include the

116. *Id.* at 764-65.

117. *Id.* at 765.

118. *Lazic v. Univ. of Pa.*, 513 F. Supp. 761, 767 (E.D. Pa. 1981).

119. *Id.*

120. *Id.* at 768.

121. *Id.* at 765, 767.

122. *Id.* at 767.

retaliation allegation within the EEOC charge.¹²³ The same conclusion is warranted when applying the proposed rule.

As previously discussed, the proposed rule requires the post charge claim to be reasonably related to and have grown out of the discrimination complained to the agency.¹²⁴ Charges are reasonably related when they develop from the same factual basis.¹²⁵ When a plaintiff files a charge alleging sex discrimination and the employer retaliates in response, the retaliation occurs as a result of the plaintiff's response to the underlying facts making up the sex discrimination. In *Lazic*, the claims are reasonably related because they developed from the plaintiff's response to the defendant's refusal to reappoint her, which she alleged was based on sex discrimination.¹²⁶ The proposed rule's second element is met when the new discrimination charge occurs as a direct consequence of the plaintiff's act of filing with the agency.¹²⁷ Indeed, a post charge claim, which alleges retaliation for filing the initial charge, is the exact situation the proposed rule seeks to include.

Courts have even used the language of the new rule when evaluating these retaliation claims under *Sanchez* and *Oubichon*. For example, some courts have specified that these claims "naturally grow[] out of any underlying substantive discrimination charge."¹²⁸

123. See, e.g., *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992); *Wentz v. Md. Cas. Co.*, 869 F.2d 1153, 1154-55 (8th Cir. 1989); *Malhotra v. Cotter & Co.*, 885 F.2d 1035, 1312 (7th Cir. 1989); *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682 (10th Cir. 1988); *Gottlieb v. Tulane Univ. of La.*, 809 F.2d 278, 284 (5th Cir. 1987); *Kirkland v. Buffalo Bd. of Educ.*, 622 F.2d 1066, 1068 (2d Cir. 1980); *Alonzo v. Chase Manhattan Bank*, 25 F. Supp. 2d 455, 457-58 (S.D.N.Y. 1998). But see *Johnson v. Gen. Elec.*, 840 F.2d 132, 139 (1st Cir. 1988) (dismissing retaliation claim when the Plaintiff did not allege he reported it to EEOC), *abrogated by Clockedile v. N.H. Dep't of Corr.*, 245 F.3d 1, 4 (1st Cir. 2001).

124. See *supra* notes 101-06 and accompanying text.

125. See *supra* notes 101-06 and accompanying text.

126. *Lazic v. Univ. of Pa.*, 513 F. Supp. 761, 768 (E.D. Pa. 1981). Furthermore, the facts suggest the same person conducted both the sex discrimination and retaliation at the same location. *Id.* at 768.

127. The "grow out" element can be met if the post charge claim is a continuation of the discrimination and arises out of the same factual basis as that complained of to the agency. See *supra* notes 95-97.

128. *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 833 (6th Cir. 1999); see, e.g., *Wentz v. Md. Cas. Co.*, 869 F.2d 1153, 1154 (8th Cir. 1989); *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169

Other courts have concluded that the initial claim and the retaliation claim are not merely reasonably related, but are directly related or are a direct continuation of the initial discrimination.¹²⁹ There is, perhaps, no other post charge claim that satisfies both elements of the new rule as clearly as a post charge retaliation claim that results from the initial act of filing a discrimination charge.

Practical and policy reasons also support allowing this claim to proceed. For example, one purpose behind the filing requirement is to allow the EEOC to respond by providing the defendant with notice of the charge.¹³⁰ Even without requiring the complainant to file a charge of retaliation, it is evident the defendant has notice of the act in which it engaged as a direct result of the filing. In fact, courts have concluded these claims are foreseeable and, therefore, provide notice by their very nature.¹³¹ As a result, the defendant's ability to defend the claim and initiate voluntary settlement or conciliation attempts with the EEOC prior to the start of litigation is in no way prohibited or impeded by the absence of a second filing.¹³² Even if the EEOC

(11th Cir. 1988); *Jeter v. Boswell*, 554 F. Supp. 946, 949 n.9 (N.D.W.V. 1983) (citing *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981)).

129. *Anderson v. Reno*, 190 F.3d 930, 938 (9th Cir. 1999); *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981); *Kirkland v. Buffalo Bd. of Educ.*, 662 F.2d 1066, 1068 (2d Cir. 1980).

130. See *supra* notes 21-22 and accompanying text.

131. See *Gupta*, 654 F.2d at 414. Because it is the nature of retaliation claims that they arise after the filing of a charge, they are foreseeable to the defendant. *Id.* Even if for some reason the defendant did not have actual notice of the retaliatory act, the defendant should foresee it. See *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 833 (6th Cir. 1999). But see *O'Rourke v. Cont'l Cas. Co.*, 983 F.2d 94, 97 (7th Cir. 1993) ("Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would . . . deprive the charged party of notice of the charge. . .") (quoting *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988)). *O'Rourke*, however, was not referring to a post charge claim of retaliation stemming from the initial filing. *Id.* at 97. In *Avagliano v. Sumitomo Shoji America, Inc.*, the court concluded a national origin discrimination claim and a race discrimination claim were "of the same type and character" such that "the defendant [could not] claim to be unfairly surprised by the allegation of race discrimination." 614 F. Supp. 1397, 1403 (S.D.N.Y. 1985). Therefore, a defendant should not at all be unfairly surprised by an allegation of retaliation that results directly from the plaintiff's filing of the initial discrimination charge.

132. This, of course, assumes the EEOC engages in some type of investigation. Some may argue that allowing the retaliation claim to go forward without a second filing would burden courts with claims that may be terminated by mediation or conciliation. See *O'Rourke*, 983 F.2d at 97; *Castro v. United States*, 775 F.2d 399, 404 (1st Cir. 1985) (allowing a plaintiff to abandon the ADEA administrative remedies by filing a complaint with the EEOC and then filing a private civil action would frustrate the

does not investigate, the defendant has notice and can initiate discussions directly with the plaintiff.¹³³

Furthermore, allowing this claim to proceed enhances the remedial nature of Title VII. As discussed in Part I, Title VII is meant to protect the layperson employee.¹³⁴ It is likely the average employee would be apprehensive about inviting additional retaliation by filing a second charge complaining about the first retaliation.¹³⁵ Requiring double filing merely creates additional procedural technicalities and barriers, thereby impeding the remedial intent of Title VII.¹³⁶ Single filing, however, promotes judicial economy,¹³⁷ protects the intended recipient of the statute, and simultaneously ensures that the defendant is able to defend the claim of retaliation.

2. Retaliation Occurring Before Initial Filing

The second type of post charge retaliation claim occurs when the complaint alleges retaliation that took place before the plaintiff filed the EEOC charge. In *Ang v. Procter & Gamble Co.*,¹³⁸ the plaintiff, an Indonesian male, was a senior systems analyst within the Integrated Packaging System.¹³⁹ In addition to complaining about several of his evaluations along with company practices, the plaintiff

intended administrative procedures and the agency's ability to deal with complaints and citing *Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981)). It is unlikely, however, that further conciliation will succeed when the discrimination continues. See *Walters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984).

133. Regardless of whether the EEOC investigates, direct settlement with the complainant is encouraged. In fact, when the EEOC does investigate, the parties are free to settle the matter on their own without the agency's signature to the settlement agreement. This will lead to withdrawal of the charge. See LINDEMANN & GROSSMAN, *supra* note 31, at 1234, 1269.

134. See *supra* notes 17-20 and accompanying text.

135. See *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989); *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981); *Riley v. Technical & Mgmt. Servs. Corp.*, 872 F. Supp. 1454, 1460 (D. Md. 1995) (citing *Nealon*, 958 F.2d at 590); *Jeter v. Boswell*, 554 F. Supp. 946, 949 n.9 (N.D.W.V. 1983); *Nat'l Org. for Women v. Sperry Rand Corp.*, 457 F. Supp. 1338, 1344 (D. Conn. 1978).

136. See *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972); *Anderson v. Reno*, 190 F.3d 930, 938 (9th Cir. 1999); *Gottlieb v. Tulane Univ. of La.*, 809 F.2d 278, 284 (5th Cir. 1987); *Gupta*, 654 F.2d at 414; *Jeter*, 554 F. Supp. at 949 n.9.

137. See *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 547 (6th Cir. 1991).

138. *Id.*

139. *Id.* at 542.

outwardly protested his supervisors' decision to exclude him from the Ph.D. team.¹⁴⁰ Following his termination, the plaintiff filed an EEOC charge alleging he was terminated because of his Indonesian national origin.¹⁴¹ In his court complaint, however, the plaintiff added allegations of retaliation, arguing the company terminated him "in retaliation for his demand that they study the differential treatment of minority Ph.Ds" at the company.¹⁴² Should the court assert jurisdiction and entertain the post charge retaliation claim or should the court require the plaintiff to file again?

As addressed in Part II, most courts have applied *Sanchez* or *Oubichon* to conclude that post charge retaliation claims that occur before the filing may not proceed.¹⁴³ The proposed rule, however, does not mandate the retaliation occur after the filing of the charge in order to allow the court jurisdiction over the claim. Under the proposed rule, the post charge claim must be reasonably related to and must grow out of the initial discrimination complaint filed with the agency.¹⁴⁴ Evaluating the first element, the court must determine whether the claims arise from the same factual basis.¹⁴⁵ In *Ang*, it seems the national origin claim arises from the plaintiff's frequent complaining about his evaluations and company policies.¹⁴⁶ In his charge, the plaintiff only marked the national origin box, and elaborated he believed he was fired "because of [his] national origin (Indonesian) since retained employees have done the same things . . . without being fired."¹⁴⁷ When elaborating on the retaliation charge, which the plaintiff included in the complaint, he noted that he was fired for demanding that his employer study the differential treatment

140. *Id.* at 544.

141. *Id.* at 545.

142. *Id.* at 547.

143. *See supra* note 43 and accompanying text.

144. *See supra* note 102 and accompanying text.

145. *See supra* note 102 and accompanying text.

146. *See Ang v. Procter & Gamble Co.*, 932 F.2d 540, 543-45 (6th Cir. 1991).

147. *Id.* at 545.

of minority Ph.Ds.¹⁴⁸ While the factual basis of both claims involve the plaintiff's outward complaints, the plaintiff's charge is not clear as to whether the national origin claim is based on the specific behavior of requesting the Ph.D. study.¹⁴⁹ The actions do, however, seem to have been conducted by the same supervisors at the same Procter & Gamble location.¹⁵⁰

Even if the court endorses a broad interpretation of the arising out of the same factual basis requirement and concludes that both claims arise out of the plaintiff's complaints, the second element of the rule is not met. The retaliation claim does not grow out of the claim alleged to the agency because the allegation of retaliation is not a *continuation* of the discrimination. Rather, the alleged national origin discrimination and retaliation occurred *simultaneously* and finalized with the plaintiff's termination. In sum, plaintiff's post charge retaliation claim does not pass muster under the proposed rule. The plaintiff would be required to file a second charge with the agency.

Other cases demonstrate in what circumstances the rule allows the second type of post charge retaliation claims to proceed. In *McKenzie v. Illinois Department of Transportation*,¹⁵¹ the plaintiff was a supplies manager responsible for training employees on the computerized inventory system used to manage the supplies at the warehouse.¹⁵² The plaintiff alleged and complained to her supervisor that one of the trainees made sexual comments to her.¹⁵³ Subsequent to voicing internal complaints, the plaintiff filed a charge alleging sexual harassment based upon the comments.¹⁵⁴ The plaintiff then amended her charge alleging additional incidents of discriminatory treatment, but did not allege retaliation in either charge.¹⁵⁵ In her

148. *Id.* at 547.

149. *Id.* at 545.

150. *Id.* at 545-47.

151. 92 F.3d 473 (7th Cir. 1996).

152. *Id.* at 476.

153. *Id.* at 477.

154. *Id.* at 477-78.

155. *Id.* at 478.

complaint, however, the plaintiff included allegations of retaliation.¹⁵⁶ Specifically, she contended she experienced retaliation for voicing internal complaints about the sexually harassing behavior.¹⁵⁷ The alleged retaliation, however, did not occur as a result of the filing to the agency.¹⁵⁸ Rather, the retaliatory acts occurred after the plaintiff voiced internal complaints and before she filed a charge with the agency.¹⁵⁹

Applying the proposed rule's first element, the court must evaluate whether the claims develop from the same factual basis.¹⁶⁰ Here, both the sexual harassment and retaliation claims developed from the allegations of sexual harassment and the facts underlying that claim.¹⁶¹ The retaliatory acts would not have occurred without the harassing comments and the plaintiff's internal complaints about the comments. In fact, the plaintiff alleged she heard a supervisor say, "I'm going to discipline her some way after this sexual harassment is over."¹⁶² Furthermore, both claims involved employees in the warehouse's mechanical division and took place at the same warehouse location.¹⁶³

To evaluate the second element, the court must determine whether the retaliation charge grows out of the charge complained to the agency, in that it is a continuation of discrimination arising from the same factual basis as the sexual harassment charge.¹⁶⁴ Here, the retaliation is a continuation of discrimination that had its basis in the facts leading to the sexual harassment claim.¹⁶⁵ Therefore, it appears the court should allow the retaliation claim to proceed.

156. *Id.* at 477-78.

157. *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 481 (7th Cir. 1996).

158. *Id.* at 483.

159. *Id.*

160. *See supra* note 102 and accompanying text.

161. *See McKenzie*, 92 F.3d at 477-78.

162. *Id.* at 477.

163. *Id.*

164. *See supra* note 103 and accompanying text.

165. *See supra* notes 161-63 and accompanying text.

Application of the proposed rule suggests that some post charge retaliation claims, which occurred prior to the filing of the initial or amended charge, will proceed.¹⁶⁶ When applying the current framework, most courts have been reticent to allow these claims to proceed.¹⁶⁷ In doing so, courts frequently emphasize that no double filing is required by demanding that plaintiffs allege retaliation in the original or amended complaint.¹⁶⁸ Nonetheless, the proposed rule goes a step further to assist the persons Title VII was meant to protect, the layperson employee who is not legally trained and less able to communicate each allegation of discrimination.¹⁶⁹

Furthermore, additional policies intended by the filing procedure—such as providing notice of the claim to the defendant—may be achieved by allowing these retaliation claims to proceed if they satisfy the proposed rule. For example, in *McKenzie v. Illinois Department of Transportation*, the employer retaliated when the plaintiff voiced an internal complaint of sexual comments.¹⁷⁰ Similar to an act of retaliation following a charge made to the agency, it is evident the defendant had notice, or should have foreseen possible retaliation.¹⁷¹ Once alerted to the discrimination charges through the internal complaint, the defendant was put on notice of a problem and should have taken appropriate steps to prevent additional discrimination. Regardless of whether the defendant took preventive action, a subsequent allegation of retaliation that was first mentioned in the court complaint should not surprise the defendant. Therefore,

166. See *supra* notes 151-65 and accompanying text.

167. See *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 546-47 (6th Cir. 1991) (upholding lower court's dismissal of retaliation claim because the plaintiff failed to assert the retaliatory dismissal charge with the EEOC and it was not within the "scope of an investigation reasonably related to Plaintiff's charge of national origin discrimination") (quoting *Ang v. Procter & Gamble Co.*, 715 F. Supp. 851, 854 (S.D. Ohio 1989)).

168. See *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 483 (7th Cir. 1996) (quoting *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 547 (6th Cir. 1991)); see also *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 545 n.2 (7th Cir. 1988); *Riley v. Technical & Mgmt. Servs. Corp.*, 872 F. Supp. 1454, 1460 (D. Md. 1995); *Hicks v. Balt. Gas & Elec. Co.*, 829 F. Supp. 791, 794-95 (D. Md. 1992).

169. See *supra* notes 17-20 and accompanying text.

170. *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 477 (7th Cir. 1996).

171. See *supra* notes 131-32 and accompanying text.

the defendant in *McKenzie* was not prevented from initiating settlement discussions regarding the sexual harassment or retaliation between the date of occurrence and the date the defendant learned a retaliation claim was in the complaint.¹⁷²

When a claim of retaliation does not occur as a continuation of discrimination arising from the same factual basis as the charge made to the agency, and occurs as a simultaneous act of discrimination, it is less likely the defendant will have, or should have, notice of the post charge claim.¹⁷³ In *Ang*, where the post charge claim did not meet the elements of the proposed rule, the alleged retaliation occurred simultaneously with the alleged national origin discrimination.¹⁷⁴ Therefore, it is more likely the defendant would be surprised by the subsequent allegation of retaliation included in the complaint. Unlike a defendant put on notice by an initial discrimination allegation to take precautions to avoid any retaliation, a defendant is unable to take such precautions when the claims occur simultaneously. Therefore, a defendant like Procter & Gamble¹⁷⁵ may be at a greater disadvantage to defend or settle the retaliation claim prior to learning of it in the complaint. In sum, the policies rooted in the filing procedure support requiring a second filing for certain post charge retaliation claims. The proposed rule requires the post charge claim or claims to be a continuation of discrimination to ensure that notice requirements embedded in the filing procedures are preserved when the court determines whether to proceed or to require a second filing.

172. See *supra* notes 132-33 and accompanying text; see also *Schaffrat v. Akron/Summit/Medina Private Indus. Council*, 674 F. Supp. 1308, 1312-13 (N.D. Ohio 1987) (dismissing plaintiff's national origin discrimination claim when EEOC did not investigate that charge and, therefore, defendant did not have an opportunity to participate in conciliation regarding that charge); *Hubbard v. Rubbermaid, Inc.*, 436 F. Supp. 1184, 1190 (D. Md. 1977) (denying a Title VII claim when defendant never had an opportunity for conciliation because the EEOC did not investigate).

173. See cases cited *supra* note 172.

174. *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 547 (6th Cir. 1991).

175. See *id.*

B. Post Charge Claims Alleging a New Classification of Discrimination or Additional Instances of the Same Classification of Discrimination

Title VII protects employees from discrimination based on several classifications including race, religion, national origin, and sex along with acts of retaliation.¹⁷⁶ In applying *Sanchez* and *Oubichon*, which place significant emphasis on the EEOC investigation, most courts have not allowed post charge claims based on a different classification to proceed.¹⁷⁷ In doing so, courts have concluded that a plaintiff must separately file a charge that is based on a different theory or type of discrimination.¹⁷⁸ However, some courts have concluded otherwise and have allowed the claims to proceed.¹⁷⁹ The proposed rule provides a framework for courts to apply without looking at the investigation. In applying the two-part test, along with policy considerations, courts will be more uniform in their conclusions.

1. A New Classification of Title VII Discrimination

It is not unusual for a complaint to include a classification of Title VII discrimination that was not included in the EEOC charge.¹⁸⁰ For example, in *Porter v. Texaco, Inc.*,¹⁸¹ the plaintiff filed an EEOC charge asserting retaliation due to her previous decision to participate

176. 42 U.S.C. § 2000e (1994).

177. See *supra* note 46 and accompanying text.

178. See, e.g., *Lowe v. City of Monrovia*, 775 F.2d 998, 1003-04 (9th Cir. 1985) (dismissing sex discrimination when the plaintiff did not file that charge with the EEOC), *modified*, 784 F.2d 1407 (9th Cir. 1986); *Dangerfield v. Mission Press*, 50 Fair Empl. Prac. Cas. (BNA) 1171, 1172 (N.D. Ill. Jul 28, 1989) (dismissing sex discrimination charge because plaintiff failed to explain why she did not use that charge initially).

179. See *supra* note 47 and accompanying text.

180. For example, a complaint may contain a charge of sex discrimination, while the agency charge only included an allegation of race discrimination. See, e.g., *Shikles v. Maytag Corp.*, 82 Fair Empl. Prac. Cas. (BNA) 1697, 1698 (W.D. Mo. May 3, 2000); *Clements v. St. Vincent's Hosp. & Med. Ctr.*, 919 F. Supp. 161, 162 (S.D.N.Y. 1996).

181. 985 F. Supp. 380 (S.D.N.Y. 1997).

in a class action sex discrimination suit against her employer.¹⁸² While the charge referred to the sex discrimination class action suit, it did not contain any allegations of sex discrimination.¹⁸³ In her complaint, however, the plaintiff alleged practices of sex discrimination.¹⁸⁴

Applying the new framework, courts will first evaluate whether these claims are reasonably related, thereby developing from the same factual basis.¹⁸⁵ In *Porter*, the plaintiff identified the retaliation as a poor interim performance review, which allegedly stemmed from her decision to participate in the class action lawsuit.¹⁸⁶ The plaintiff's complaint alleged that her employer administered the performance management program—the employee performance review system—in a manner that unfairly limited the employment opportunities of women.¹⁸⁷ Specifically, the plaintiff alleged the “system was used to frustrate her career ambitions, to deny her opportunities for challenging work, and to limit her salary.”¹⁸⁸ The two claims—retaliation and sex discrimination—were not based on the same facts.¹⁸⁹ The retaliation claim stemmed from the plaintiff's involvement in the class action sex discrimination suit, whereas the sex discrimination claim grew out of the company's performance evaluation system and the allegation that it systematically discriminated on the basis of sex.¹⁹⁰ Even without considering whether the claims involved the same people at the same location, the

182. *Id.* at 382. The plaintiff also asserted age discrimination in her EEOC charge. *Id.*

183. *Id.*

184. *Id.*

185. *See supra* notes 101-02 and accompanying text.

186. *Porter*, 985 F. Supp. at 382.

187. *Id.*

188. *Id.* at 382-83.

189. *Id.* at 383-84.

190. *Id.*

two claims do not meet the reasonably related element of the proposed framework.¹⁹¹

The second element of the proposed rule requires the post charge claim to grow out of the discrimination complained to the agency, such that it is a continuation of discrimination arising from the same factual basis as the claim made to the agency. Here, the sex discrimination is not a continuation of discrimination based on the plaintiff's involvement in the class action lawsuit. Rather, it is a new type and instance of discrimination with a new factual basis founded on the company's performance evaluation system.¹⁹² Here, even focusing solely on the second element, the lack of factual similarity between the two claims is fatal to any suggestion that the post charge sex discrimination claim should proceed without subsequent filing.

Application of the rule may ignite suggestion that a post charge claim alleging a different classification of discrimination will never pass muster. Further review, however, demonstrates otherwise. In *Abdulrahim v. Gene B. Glick Co., Inc.*,¹⁹³ the plaintiff worked as a maintenance groundskeeper at an apartment complex owned by the defendant.¹⁹⁴ In June 1983, the plaintiff filed an EEOC charge alleging national origin discrimination.¹⁹⁵ The charge specified that in September 1982, the plaintiff applied for two open maintenance-ground staff positions, but his employer did not hire him for either job.¹⁹⁶ The plaintiff further alleged within the charge that the defendant promised him he would be rehired for the following summer, but was not hired or rehired because of his Palestinian

191. The proposed framework suggests when claims develop from the same factual basis, courts evaluate whether the alleged discrimination involved the same people at the same location. *See supra* note 102 and accompanying text. While this is not determinative, it should still be considered. *See id.*

192. The fact the plaintiff alleged a new *classification* or *type* of Title VII discrimination is not fatal. *See supra* note 105 and accompanying text. If the post charge sex discrimination allegation were somehow rooted in the plaintiff's decision to participate in the class action lawsuit, it would be more likely that the post charge claim would satisfy the "grow out" requirement of the new framework.

193. 612 F. Supp. 256 (N.D. Ind. 1985).

194. *Id.* at 258-59.

195. *Id.* at 259.

196. *Id.*

national origin.¹⁹⁷ The plaintiff did not include a specific charge of race discrimination, but did include such an allegation in the court complaint.¹⁹⁸

Does the post charge claim satisfy the first element of the proposed rule, which requires it to be reasonably related to the filed charge? To answer this, courts will have to evaluate the factual relationship of the claims. The factual basis for the plaintiff's original allegation focuses on the defendant's failure to rehire him due to his Palestinian origin.¹⁹⁹ The plaintiff's race and color allegations focus on the argument that he included the following in the EEOC charge: "[a]pproximately September 7, 1982, I had been promised a transfer to Respondent's Farrington Apartments," of which plaintiff was allegedly denied, but told that he would be rehired the following summer.²⁰⁰ Furthermore, the plaintiff specified in the EEOC charge that "[o]n September 14, 1982, [he] learned that a white had been newly hired to fill the position," and "[d]uring May, 1983, Respondent hired a white employee to fill the position to which [plaintiff] should have been recalled."²⁰¹ Here, all the claims develop from the same factual basis—that the defendant did not select the plaintiff for one of two open maintenance ground staff positions and did not rehire the plaintiff to fill the position for the following summer.²⁰² Furthermore, it appears the same supervisors at the same

197. *Id.*

198. *Id.* at 261. A review of the EEOC charge demonstrates the plaintiff checked only the box for national origin as the basis for the alleged discrimination against him. *Id.*

199. *Abdulrahim v. Gene B. Glick Co., Inc.*, 612 F. Supp. 256, 261 (N.D. Ind. 1985).

200. *Id.* at 259, 261.

201. *Id.* at 261.

202. *Id.* In *Lazuran v. Kemp*, the plaintiff—a Caucasian female—worked as a trial attorney in the Los Angeles District office of the EEOC and applied for the exact same position in the Seattle District office. 142 F.R.D. 466, 467 (W.D. Wash. 1991). The EEOC denied the plaintiff the position and hired a black male for the vacant Seattle District office position. *Id.* The plaintiff filed a charge with the EEOC, alleging the defendant's "failure to hire her constituted impermissible sex and race discrimination." *Id.* Once the claims proceeded to litigation, the plaintiff attempted to add a claim of national origin discrimination. *Id.* The plaintiff alleged that subsequent to filing her charge, she learned the defendant had also selected an Hispanic female for the Seattle District office trial attorney position. *Id.*

Again, the post charge claim of national origin discrimination is "reasonably related" to the allegations within the charge. *Id.* at 469. More specifically, all three claims were based on the fact that

corporate location made this decision. The first element of the proposed rule is satisfied.²⁰³

Before concluding the race and color claims²⁰⁴ can proceed without subsequent filing, the post charge claims must grow out of the discrimination complained of to the agency, thereby amounting to a continuation of discrimination arising from the same factual basis as the claim complained of to the agency. The plaintiff first claims the defendant discriminated against him based on his national origin by not hiring and rehiring him.²⁰⁵ Then, the plaintiff claims the defendant's decision to hire and rehire white employees further exacerbated the discrimination to include claims of race and color violations as well.²⁰⁶ As previously noted, the continuing discrimination does not have to be the same *type* or *classification* of Title VII discrimination. It must, however, develop from the same factual basis as the original charge. Such is the case in *Abdulrahim*, where the plaintiff based each allegation on the defendant's failure to hire and rehire him while deciding to hire other employees to these positions.²⁰⁷ As a result, the post charge claim passes the proposed

the defendant selected other people for the open trial attorney position rather than the plaintiff. Furthermore, as in *Abdulrahim*, the decision to hire the other employees seems to have been made by the same people and at the same location as the decision not to hire the plaintiff to the trial attorney position. Additionally, the national origin claim "grows out" of the sex and race allegations within the charge. The plaintiff first alleged that the defendant's failure to hire her constituted race and sex discrimination when a black man was appointed to the position. *Id.* at 467. Thereafter, the plaintiff contended the defendant's subsequent decision to appoint a Hispanic female to this position further exacerbated the discrimination, to include a new type of discrimination founded on the same basis. *Id.*

203. See *Abdulrahim*, 612 F. Supp. at 258-59. It is not the court's role to determine the viability of the race or color claim. Concluding the plaintiff's focus on the "white" employees merely provides more evidence for the national origin claim impedes a fundamental goal of Title VII, which is to protect lay employees who are not aware of the intricacies of the specific claims and may not know which claim is more appropriate to allege. See *supra* notes 17-20 and accompanying text.

204. Courts consider claims based on race and color to be the same. See *supra* note 131.

205. See *Abdulrahim*, 612 F. Supp. at 259.

206. *Id.* at 261. When evaluating the claims under the earlier framework, the district court noted "two references to white employees are insufficient to allege race or color discrimination in the charge." *Id.* The earlier framework, however, does not emphasize the amount or extent of factual similarity required. The proposed framework does not suggest a measure of how factually similar the claims must be. It does, however, require the court to evaluate the factual basis of the claims without concluding the use of one word allows or disallows the post charge claim to proceed.

207. See *id.* at 259.

rule's requirements, thereby allowing the court to proceed with the claim.

2. Additional Instances of the Same Classification of Title VII Discrimination

Under the proposed rule, a post charge claim of discrimination will not proceed merely because it involves an additional instance of the same *type* or *classification* of Title VII discrimination.²⁰⁸ In *Moore v. Allstate Insurance Co.*,²⁰⁹ the plaintiff filed an EEOC charge alleging she received a negative performance evaluation solely based on her race.²¹⁰ In her complaint, however, the plaintiff alleged her supervisors engaged in race discrimination by giving her a negative performance evaluation and failing to promote her.²¹¹ She later filed an amended complaint, asserting additional allegations of race discrimination including that Allstate "maintain[ed] separate lines of progression based on race . . . so as to affect adversely [her] compensation, evaluations, [and] promotions."²¹²

In applying the proposed rule, the court must first determine whether any of the post charge race discrimination allegations are reasonably related to the claim within the charge. Here, even assuming the alleged discrimination involved the same defendants at the same location, the post charge claim's factual basis is not close enough to the charge's claims to be reasonably related. In sum, the claims do not develop from the same factual basis and cannot proceed with the initial charge.

Each claim alleges racial discrimination conducted by the plaintiff's Allstate supervisors at the same Allstate facility, thereby alleging additional instances of the same classification of Title VII

208. Courts conclude similarly when applying the current framework. *See, e.g., Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994).

209. 928 F. Supp. 744 (N.D. Ill. 1996).

210. *Id.* at 747.

211. *Id.*

212. *Id.*

discrimination. The race claim in the charge, however, has its factual basis in the performance evaluation, while the initial and amended complaint allegations have their factual basis in several of the company's policies and procedures, including its failure to promote the plaintiff. At first glance, the factual basis of all the race claims involves the company's employment practices.²¹³ Nonetheless, the proposed rule is not intended to allow plaintiffs to have a free-range attack on an employer's various practices and policies without, at least, following the proper procedural requirements.²¹⁴ This is so even if the plaintiff expands her attack by focusing on the same classification of discrimination that was included in the EEOC charge. Indeed, the rule is meant to balance the interests of protecting layperson employees and promoting judicial efficiency with providing employers adequate notice of discrimination allegations and allowing them to resolve such claims prior to litigation.²¹⁵ Permitting a post charge claim to proceed merely because it focuses on additional instances of the same discrimination classification does not further these goals.

The proposed rule further operates to prevent any post charge claim from proceeding if it does not develop from the same factual basis as any claim included within the charge to the agency. As a result, when a claim does not satisfy the first element of the rule because it does not arise from the same factual basis, it cannot satisfy the second element of the rule. Even if the post charge claim or claims are a continuing form of discrimination, the rule is only met if the continuing discrimination arises from the same factual basis as any

213. See *supra* notes 199-202 and accompanying text.

214. Furthermore, the post charge race claims do not "grow out of" the claim reported to the agency. While one may argue the race discrimination continued, close analysis does not demonstrate that the post charge race claim was a continuation of discrimination arising from the same factual basis as the race claim made to the agency. Again, the plaintiff did not allege the defendant discriminated by giving her *another* negative performance evaluation. Instead, plaintiff alleged *new* instances of the same discrimination based on the defendant's failure to promote the plaintiff and the defendant's operation of its progression policy.

215. See *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 547 (6th Cir. 1991); *supra* notes 17-20 and accompanying text.

claim included in the charge. In sum, the post charge claims asserted in *Moore*, which focus on additional instances of the same classification of discrimination, do not arise from the same factual basis as the claim included in the charge and are, therefore, not permitted to proceed without a second filing.

C. Broadening of Claims to Include Other Employment Practices

Courts have also used the *Sanchez* and *Oubichon* framework to evaluate post charge claims alleging a broad based attack on employment practices.²¹⁶ In doing so, most courts have not allowed such claims to proceed, but have often focused on the EEOC's investigation.²¹⁷ Applying the proposed rule, the conclusion will often be the same, but the focus of the analysis will not be on the EEOC's investigation. For example, in *Pickney v. American District Telegraph Company of Arkansas*,²¹⁸ the employer informed the plaintiff, a Caucasian woman, that she was terminated due to excessive absenteeism.²¹⁹ The plaintiff thereafter filed an EEOC charge alleging she was terminated because of her race and sex.²²⁰ In her charge, the plaintiff specified she only missed thirteen days since being hired, while her male and African-American coworkers, who

216. See *supra* note 48 and accompanying text; see also *Jackson v. Ohio Bell Tel. Co.*, 555 F. Supp. 80, 82-83 (D. Ohio 1982) (dismissing race discrimination claims added to complaint that were not in the EEOC charge and were not reasonably expected to grow out of the charge); *Metcalf v. Omaha Steel Castings Co.*, 507 F. Supp. 679, 684-85 (D. Neb. 1981) (disallowing complaint to be amended to include an allegation of disparate impact when the EEOC charge only alleged plaintiff was discriminated against). While initial portions of this Part addressed situations where the post charge allegations are based on employment policies, it is useful to see how the new framework addresses these claims in general. Other examples of broad-based claims regarding other employment practices include charges the employer maintained separate lines of seniority and separate standards of conduct for various employees. See *Jackson*, 555 F. Supp. at 82; see also *Combs v. C.A.R.E., Inc.*, 617 F. Supp. 1011, 1012 (E.D. Ark. 1985) (alleging that the defendant engaged in racially discriminatory hiring, promotion, termination, wages and placement).

217. See, e.g., *Combs*, 617 F. Supp. at 1012; *Pickney v. Am. Dist. Tel. Co. of Ark.*, 568 F. Supp. 687 (E.D. Ark. 1983).

218. 568 F. Supp. 687 (E.D. Ark. 1983).

219. *Id.* at 688.

220. *Id.*

were not terminated, missed work on more numerous occasions.²²¹ In her complaint, the plaintiff broadened her claims to include an allegation that the male supervisors systematically assigned jobs that kept her and other female employees from promotion.²²²

Here, the post charge claim pertaining to the job assignment and promotion policy is not reasonably related to either claim of race or sex discrimination contained in the charge.²²³ The initial charge's factual basis develops from the plaintiff's termination and the alleged absenteeism of herself compared to that of her coworkers.²²⁴ The post charge allegation, however, stems from an attack on the defendant's policy and process of assigning jobs and promoting employees to beyond entry-level positions.²²⁵ These claims do not develop from the same factual basis as either claim within the charge. Furthermore, it is not evident that the same people were responsible for the termination as were responsible for the enforcement of the assignment or promotion policy. In any event, the claim does not satisfy the second element of the proposed rule, which requires the post charge claim grow out of the discrimination reported to the agency. The contention regarding the discriminatory assignment of jobs and promotions may be another allegation of sex discrimination, but it is not a continuation of the discrimination alleged to the agency. Rather, it is a new allegation of discrimination stemming from a completely different factual basis. As a result, the court should require the plaintiff to file a second charge with the agency.

D. Expansion of Continuing Violation Theory

By requiring that the discrimination be continuing in nature, the proposed rule emulates—but expands and deepens—what several courts have required when evaluating the timeliness of Title VII

221. *Id.*

222. *Id.* at 689.

223. *Id.* at 691-92.

224. *Pickney v. Arn. Dist. Tel. Co. of Ark.*, 568 F. Supp. 687, 688 (E.D. Ark. 1983).

225. *Id.* at 689.

claims. Courts are often faced with a situation where several claims are included in the EEOC charge, but one or more is untimely because it was not filed within 180 days of its occurrence.²²⁶ Before dismissing the untimely claim, courts evaluate whether it falls within the continuing violation exception.²²⁷ When the plaintiff demonstrates a series of related acts, one or more of which occurred within the 180 days, the untimely claim can proceed.²²⁸ In doing so, however, the plaintiff must show a series of continuous violations and not merely a series of unrelated and isolated instances of discrimination.²²⁹ To evaluate this standard, courts often determine whether the alleged acts, including the untimely claim, involve the same type of discrimination.²³⁰ Other courts place more emphasis on whether there is sufficient evidence to show the alleged discriminatory acts are related closely enough to constitute a continuing violation.²³¹ Both analyses, however, focus on the relationship between the claims that took place inside and outside the requisite time frame.

For example, in *Fielder v. UAL Corp.*,²³² the court evaluated the similarity of the claims and concluded that two retaliation claims were closely related enough to constitute a continuing violation.²³³ The plaintiff, who worked as a customer service agent for United Airlines, claimed she had been subjected to continuing harassment

226. See *supra* note 4.

227. See, e.g., *Fielder v. UAL Corp.*, 218 F.3d 973, 983 (9th Cir. 2000).

228. See *supra* note 4 and cases cited *infra* note 229.

229. *Fielder*, 218 F.3d at 983; *Robbins v. Jefferson County Sch. Dist.*, 186 F.3d 1253, 1257 (10th Cir. 1999); *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994); *Green v. Los Angeles County Superintendent of Schs.*, 883 F.2d 1472, 1480 (9th Cir. 1989).

230. Courts evaluate three factors: (1) whether the alleged acts involve the same type of discrimination; (2) the frequency of the alleged acts; and (3) the "degree of permanence" with regard to whether it "should trigger an employee's awareness of and duty to assert his or her rights." *Berry v. Bd. of Supervisors of La. State Univ.*, 715 F.2d 971, 981 (5th Cir. 1983); see also *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1310 (10th Cir. 1999) (citing *Martin v. Nannie & The Newborns, Inc.*, 3 F.3d 1410, 1415 (10th Cir. 1993)).

231. See *supra* notes 218-25, 227-30 and accompanying text.

232. 218 F.3d 973 (9th Cir. 2000).

233. *Id.* at 988.

and retaliation.²³⁴ After voicing internal complaints about this behavior, the plaintiff took medical leave, requesting a transfer to a different United Airlines location; she subsequently returned to the airport where she worked to escort her disabled mother onto a United flight.²³⁵ Upon boarding the plane, the plaintiff's supervisor allegedly reprimanded her in public.²³⁶ Thereafter, United Airlines did not act on the plaintiff's transfer request, but instead transferred another employee who had less seniority than the plaintiff.²³⁷ After determining these events were closely related enough to constitute a continuing violation, the court allowed the untimely claim to proceed.²³⁸

Similarly, in *Draper v. Coeur Rochester, Inc.*,²³⁹ the court concluded the defendant subjected the plaintiff to a series of closely related similar occurrences of continuous sexual harassment committed by the same person.²⁴⁰ The court applied the continuing violation theory to allow the plaintiff to include the untimely claim.²⁴¹

In *Green v. Los Angeles County Superintendent of Schools*,²⁴² the court focused on the relationship between timely and untimely claims when it concluded two different forms of employment discrimination were not closely related enough to constitute a continuing violation.²⁴³ The court emphasized the plaintiff's early claims focused on "harassment from other employees and [the company's] failure to train and relocate her," but her later claims, asserted after she left her employment, involved the company's "refusal to place her on medical leave and provide medical benefits."²⁴⁴ The court held two separate

234. *Id.* at 977-83.

235. *Id.* at 981.

236. *Id.*

237. *Id.* at 982.

238. *Fielder v. UAL Corp.*, 218 F.3d 973, 988 (9th Cir. 2000).

239. 147 F.3d 1104 (9th Cir. 1998).

240. *Id.* at 1108-09.

241. *Id.* at 1109.

242. 883 F.2d 1472 (9th Cir. 1989).

243. *Id.* at 1481.

244. *Id.*

forms of discrimination did not meet the continuing violation theory standard.²⁴⁵

Like the continuing violation theory analysis, the proposed rule for post charge Title VII claims evaluates the relationship between the claims. By requiring the claims to be so related that the post charge claim develops from the same factual basis and is a continuation of the same basis of any discrimination reported to the agency, the proposed rule is more specific and requires more evaluation than courts have given to continuing violation theory analyses. Indeed, the proposed rule requires more analysis than given in *Fielder v. UAL Corp.*,²⁴⁶ in which the court concluded the two claims were closely related enough to constitute a continuing violation,²⁴⁷ and *Draper v. Coeur Rochester, Inc.*,²⁴⁸ where the court concluded the allegations of sexual harassment satisfied the continuing violation theory.²⁴⁹

In addition, the proposed rule does not require the claims to be of the same type or classification of Title VII discrimination as any of those within the charge. Unlike that required by the continuing violation theory standard, post charge Title VII claims can proceed where the discrimination is of a different classification, but arises from the same factual basis as any claim included in the charge. The rule recognizes that discrimination can be of a continuing nature despite being carried out in a different way.

IV. ENSURING THAT THE PROPOSED RULE SATISFIES THE POLICIES ACHIEVED BY THE FILING PROCEDURE

The proposed framework provides courts with a definitive and appropriate rubric for analyzing post charge Title VII claims with

245. *Id.*

246. 218 F.3d 973 (9th Cir. 2000).

247. *Id.* at 988.

248. 147 F.3d 1104 (9th Cir. 1998).

249. *Id.* at 1109.

consistency.²⁵⁰ In doing so, the rule operates to ensure the policies behind the EEOC filing procedures are met. As discussed in Part I, the filing procedure makes certain the defendant will receive notice of the charge, thereby ensuring that the defendant can defend the claim and engage in conciliation with the EEOC or settlement with the plaintiff directly.²⁵¹ The proposed rule makes certain that only unfiled charges that are based on the same factual basis as any of the filed charges can proceed. A defendant who is aware of the initial charge should not be surprised by continued discrimination based on the same set of facts.²⁵² Conversely, a defendant is likely to be surprised by a new instance of discrimination arising from a separate factual basis. While it is improper to speculate that each defendant would have notice of the continuing discrimination without a subsequent filing, it is reasonable to expect that an employer would take precautions to ensure that discrimination did not continue—especially discrimination arising from the same factual basis.²⁵³ Thus, requiring the discrimination to be of a continuing nature acts to protect employers from facing post charge discrimination claims without any warning or suggestion that the already problematic factual basis could lead to a second problem down the road.

250. This Article does not apply the proposed rule to each type of post charge Title VII claim. For examples of other post charge claims, see LARSON, *supra* note 24, § 76.06[1][c].

251. See *supra* notes 21-29 and accompanying text.

252. See *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 504 (7th Cir. 1994) (recognizing that the relevant EEOC charge “provided ample notice to Blue Cross of the substance of her complaint because Blue Cross’ lawyers could be expected to realize that the *facts as alleged* in the EEOC charge might support a claim of sex discrimination”) (emphasis added).

253. One court emphasized that a functional approach to applying the *Sanchez* rule is to “consider whether the purposes of the preliminary administrative process are satisfied,” such as “whether the defendant had sufficient notice from the administrative charge of the alleged kinds and areas of discrimination.” *Jiron v. Sperry Rand Corp.*, 423 F. Supp. 155, 159 (D. Utah 1975). The proposed rule expects that the defendant has sufficient notice of the factual basis of the discrimination and should be aware of discrimination that could continue based on the facts. Furthermore, courts have concluded a race discrimination claim and a national origin discrimination claim are sufficiently related such that the defendant cannot be unfairly surprised by the allegation of the national origin claim. Therefore, an allegation of continuing discrimination based on the same facts as already complained of to the agency should not surprise the defendant. See *Clements v. St. Vincent’s Hosp. & Med. Ctr. of New York*, 919 F. Supp. 161, 164 (S.D.N.Y. 1996); *Avagliano v. Sumitomo Shoji Am., Inc.*, 614 F. Supp. 1397, 1403 (S.D.N.Y. 1985).

The filing procedures are also concerned with ensuring that laypersons are not precluded from raising claims merely because they fear retaliation²⁵⁴ or lack the understanding to complete the charge with specifics.²⁵⁵ The proposed framework addresses a plaintiff's fears by allowing retaliation claims, which result from the act of filing, to proceed without requiring a second filing.²⁵⁶ Similarly, the proposed rule does not preclude a claim from proceeding for the sole reason the alleged discrimination occurred before the filing of the charge, nor does it punish a complainant who was unable to articulate all the facts pertaining to the alleged discrimination.

While a layperson may not artfully articulate the types of discrimination he or she allegedly faced, the complainant—even if pro se—should be able to recite all the facts that led to the alleged discrimination.²⁵⁷ When applying the proposed rule and seeking to determine whether the post charge claims are reasonably related to and grow out of any of the charges complained of to the agency, courts will need to critically evaluate the specificity of the facts included in the charge. Therefore, a charge with a complete factual recitation will assist the court to determine whether the post charge claims contain the same factual basis as reported to the agency.

Nonetheless, in light of Title VII's remedial nature, a plaintiff's lack of education or communication skills may result in a vaguely languaged complaint. When the charge does not include sufficient information for the court to determine the relationship between the claims, the court should look to any amendments made to the original charge and any supplementary documents provided to the EEOC with the charge, such as a sworn affidavit or letter.²⁵⁸ When available,

254. See *supra* note 127 and accompanying text.

255. See *supra* notes 17-20 and accompanying text.

256. The filing procedure requires the complainant to include "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3) (2000). At the minimum, "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of" is required. *Id.* § 1601.12(b).

257. See *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 502 (7th Cir. 1994).

258. See *id.*

these documents may be used to “clarify or amplify” the allegations and more specifically, the facts surrounding those allegations.²⁵⁹ If, however, a vague charge does not include any such supplementary documents, the court should require the plaintiff to augment the vague or conclusory allegations with the hard facts that led to the charge complained of to the agency.²⁶⁰

For example, when evaluating the relationship between the claims in *Ang v. Procter & Gamble Co.*,²⁶¹ the plaintiff elaborated in his charge that he believed he was fired “because of [his] national origin (Indonesian) since retained employees [had] done the same things . . . without being fired.”²⁶² Nonetheless, it was unclear whether the “same things” included plaintiff’s request that the company study the alleged differential appointment of minorities to the Ph.D. team. Such vagueness impedes a court’s ability to determine the factual relationship between the national origin claim and the post charge claim, which focused on retaliation for requesting the study pertaining to minority Ph.Ds. A court could, however, reduce this impediment by requesting the plaintiff supplement these vague statements with more specific information. The court could then ascertain whether the new charge derives from the same factual basis as the charge alleged to the agency. Moreover, the court would be carrying out an underlying goal of the filing procedure—ensuring that a layperson’s failure to file with specificity does not punish the very persons that Title VII is intended to protect.²⁶³

259. *Id.* at 503. (“[P]ursuant to 29 C.F.R. § 1601.12(b), these additional allegations cannot expand the scope of the . . . charge; they only may ‘clarify or amplify’ the allegations” made to the agency.).

260. *See Pickney v. Am. Dist. Tel. Co. of Ark.*, 568 F. Supp. 687, 691 (E.D. Ark. 1983). The EEOC regulations authorize the Commission to request that the aggrieved party supplement the charge with more facts. 29 C.F.R. § 1601.15 (2000). If the EEOC fails to do so, as is likely when it does not conduct an investigation, the court can and should require this of the complainant.

261. 932 F.2d 540 (6th Cir. 1991).

262. *Id.* at 545.

263. *See Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

CONCLUSION

The current framework for determining whether a court should proceed with a post charge Title VII claim or should require the plaintiff to file a second charge is often inappropriate and leads to inconsistent results.²⁶⁴ When applying the *Sanchez* and *Oubichon* rules, courts evaluate the relationship between the claims by frequently focusing on the actual or hypothetical investigation conducted by the EEOC.²⁶⁵ It is evident, however, that this rubric is ineffective when the EEOC does not conduct an investigation.²⁶⁶

The proposed framework focuses on the relationship between the claims alleged in the charge and the new claims alleged in the court complaint.²⁶⁷ Although the language of the proposed rule incorporates the “reasonably related” and “grows out of” language within the current framework, it requires courts to evaluate the factual development of both claims along with the continuing nature of the post charge claim or claims.²⁶⁸ Furthermore, it safeguards the policies behind the filing procedure, which aim to protect layperson employees as well as to provide the defendant with notice of the allegations so it can pursue conciliation or settlement discussions with the agency or the plaintiff directly.²⁶⁹

The first element of the rule, which requires the post charge claim to be a continuation of the discrimination arising from the same factual basis as any of the filed charges, alleviates any contention that the defendant is not provided with fair warning of the facts and could not take appropriate measures to ensure that further discrimination, based on those facts, did not occur.²⁷⁰ If, however, the defendant does not take appropriate measures—or those measures fail—the

264. See *supra* Part II.

265. See *supra* Part II.B.

266. See *supra* Part II.B.2.

267. See *supra* Part III.

268. See *supra* Part III.

269. See *supra* notes 130-35 and accompanying text.

270. See *id.*

defendant cannot successfully claim any hindrance in initiating discussions with the EEOC or the plaintiff prior to learning of the federal court complaint. Indeed, the proposed rule promotes Congress' intent to encourage conference, conciliation and persuasion.

Furthermore, the suggestions for carrying out the rule address the remedial nature of Title VII, which is to eradicate employment discrimination, rather than to block plaintiffs from having their allegations addressed. By requiring the court to evaluate the factual relationship between the claims, the new rule focuses on the plaintiff and the conduct to which he or she was subjected rather than on the EEOC's actions or lack thereof.²⁷¹ When evaluating this relationship, however, courts should continue to ensure that the remedial nature is maintained by reviewing any amendments and supplementary documents provided to the EEOC along with the charge.²⁷² If none exist, the courts should require the complainant to clarify any vagueness within the charge.²⁷³ This will assist courts to understand the factual basis of the claims and determine more easily whether to entertain the unfiled claim or whether to require the complainant to become reacquainted with the EEOC filing procedures. In sum, it will aid the court to apply a new rule that provides a way to take *charge* over post charge Title VII claims.

271. *See supra* Part III.

272. *See supra* notes 260-63 and accompanying text.

273. *See supra* note 260 and accompanying text.